

IN THE
CIRCUIT COURT OF ST. LOUIS, MISSOURI
22nd JUDICIAL CIRCUIT

STATE OF MISSOURI,)	
)	Case No. 2022-CR01300
v.)	
)	
PATRICIA MCCLOSKEY,)	
)	
Defendants.)	

**ATTORNEY GENERAL’S MEMORANDUM IN OPPOSITION TO THE CIRCUIT
ATTORNEY’S MOTION TO STRIKE THE ATTORNEY GENERAL AS A PARTY**

On July 20, 2020, Attorney General Eric S. Schmitt filed a brief as *amicus curiae* to defend the freedom of all Missourians who seek to exercise their fundamental right to keep and bear arms in self-defense. *See* Amicus Brief of Attorney General Eric Schmitt Supporting Dismissal of the Case (filed July 20, 2020). The Attorney General’s Amicus Brief observes that “the right to use firearms to defend one’s person, family, home, and property has deep roots in Missouri law,” and that “Missourians should not fear criminal prosecution when they use firearms to defend themselves and their homes.” *Id.* at 1. The Attorney General argues that “[a] highly publicized criminal prosecution of Missouri citizens for exercising these fundamental freedoms threatens to intimidate and deter law-abiding Missouri citizens from exercising their constitutional right of self-defense,” and that “public policy dictates that this prosecution should not proceed.” *Id.*

On September 4, 2020, the Circuit Attorney filed a “Motion To Strike Attorney General Eric Schmitt As A Party To The Case.” The Court should deny this motion for four reasons. *First*, the motion is procedurally defective because the Circuit Attorney failed to comply with the basic notice requirements of Rule 20.01(d). *Second*, the motion seeks impossible relief because, as the Circuit Attorney concedes, the Attorney General has appeared only as an *amicus curiae* in this case—he does not appear as a party or represent a party. *Third*, the Missouri Supreme Court Rules,

Missouri statutes, and the Supreme Court’s cases all uphold the Attorney General’s authority to file amicus briefs in cases that implicate the fundamental rights of all Missourians. *Fourth*, as *amicus curiae*, the Attorney General advocates for interests of third parties whom neither the Circuit Attorney nor the defendant represents—namely, all other Missourians whose fundamental rights are threatened by this case. *See id.*

A. The Motion to Strike Is Procedurally Defective Due to Inadequate Notice.

The Circuit Attorney’s “Motion to Strike Attorney General Eric Schmitt As A Party To The Case” was filed late in the evening on Friday, September 4, 2020, and the Notice of Hearing was also filed late in the evening on Friday, September 4, 2020. The Notice provided for a hearing in Division 1 on Thursday, September 10, 2020, at 9:00 am. The Circuit Attorney did not consult with the Attorney General’s Office about scheduling and did not file a motion to shorten time.

Rule 20.01(d) provides that “[a] written motion, other than one which may be heard ex parte, and notice of the hearing thereof *shall* be served not later than *five days before the time specified for the hearing....*” Mo. Sup. Ct. R. 20.01(d) (emphases added). In calculating the five-day notice period, weekends and legal holidays are excluded: “When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.” Mo. Sup. Ct. R. 20.01(a). September 5 and 6 were weekend days, and September 7 was a legal holiday (Labor Day). Accordingly, the Circuit Attorney provided only three days’ notice for the hearing on the instant motion, in violation of Rule 20.01(d).

Compliance with Rule 20.01(d) is mandatory. *See Frye v. Levy*, 440 S.W.3d 405, 408 (Mo. banc 2014) (“‘Shall’ means ‘shall.’ It unambiguously indicates a command or mandate.”). No relief can be granted on a motion that violates Rule 20.01(d). *See, e.g., State v. Hellems*, 13 S.W.3d

302, 305 (Mo. App. E.D. 2000). Accordingly, the Court should not grant any relief on the Circuit Attorney's procedurally defective Motion to Strike, but should disregard it as a nullity.

B. The Circuit Attorney's Motion Seeks Impossible Relief Because the Attorney General Has Appeared as *Amicus Curiae*, Not as a Party.

The Circuit Attorney's Motion requests that this Court "strike the Attorney General, his representative Cristian Stevens, and all co-counsel from the AG's office *as parties representing the State* in the above-referenced cause number." Mot. to Strike, at 1 (emphasis added); *see also id.* at 7. The Motion seeks impossible relief because the Attorney General has not appeared as a party and does not represent a party; he has appeared as *amicus curiae*. The Attorney General's amicus brief, filed on July 20, 2020, is entitled "Amicus Brief of Attorney General Eric Schmitt Supporting Dismissal of the Case." Att. Gen. Amicus Br., at 1. The Conclusion states that "the Attorney General respectfully requests that this Court dismiss this case at the earliest possible opportunity." *Id.* at 12. The signature block indicates that the Attorney General and his attorneys appear as "*Counsel for Amicus Curiae Attorney General.*" *Id.* The brief does not state that the Attorney General is a party, and it does not state that he appears, or attempts to appear, on behalf of the State or any other party in this case. It clearly states that the Attorney General appears as *amicus curiae*. *See id.* In fact, the Circuit Attorney concedes that "the AG filed an amicus brief, categorizing himself as a friend of the Court (and not a party to the case)." Mot. to Strike, at 1.

As the Circuit Attorney acknowledges, "an amicus curiae is not a party." Mot. to Strike, at 2 (quoting *City of Kansas City v. Kindle*, 446 S.W.2d 807, 818 (Mo. 1969)). The Circuit Attorney claims that "[u]pon the brief's filing, the AG's office was reflected in Case.net as a party to this case, presumptively on behalf of the State." Mot. to Strike, at 1. But this designation does not appear in Case.net. The "Parties and Attorneys" tab of Case.net for this case lists the attorneys

from the Attorney General's Office as "Additional Attorneys." It does not designate them as attorneys for any "party," and it does not list them as representatives of "the State."

Accordingly, the Circuit Attorney's Motion to Strike the Attorney General as a Party is futile because it seeks impossible relief. The Attorney General is participating in the case as an *amicus curiae*, not a party. Since he is not a party, he cannot be stricken "as a party" as the Circuit Attorney requests.

C. Both the Missouri Supreme Court Rules and Section 27.060 Confirm the Attorney General's Authority to File Amicus Briefs Defending the Public Interest.

The Circuit Attorney argues that Section 27.060, RSMo, does not provide authority for the Attorney General to file an amicus brief in a criminal case. *See* Mot. to Strike, at 5. This is incorrect. Both the Missouri Supreme Court Rules and Section 27.060 explicitly confirm the Attorney General's authority to file an amicus brief in any case that implicates the interests of all Missourians. Moreover, recent cases confirm the Attorney General's authority to file amicus briefs in cases where the State is represented by a local prosecutor.

First, Rule 84.05(f)(4) of the Missouri Supreme Court Rules provides that the Attorney General may file an amicus brief in any case as of right, without the consent of the parties or leave of court. The Rule states that "[c]onsent to the filing of suggestions or a brief of an amicus curiae need not be had when the suggestions or brief are presented by the attorney general." Mo. Sup. Ct. R. 84.05(f)(4). This Rule applies in all appellate courts in Missouri, and it is routine practice for the Attorney General to file amicus briefs as of right, without seeking consent of the parties or leave of the court. *See id.* The Circuit Attorney cites no authority to suggest that the Attorney General's authority under this Rule should not extend to trial courts as well.

Second, Section 27.060 confirms the Attorney General's broad authority to file amicus briefs and otherwise litigate on behalf of the interests of all Missourians. That statute states that

“the attorney general shall institute ... all civil suits and other proceedings at law or in equity requisite and necessary to protect the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary; and he may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state’s interests are involved.” § 27.060, RSMo.

The Attorney General’s sweeping authority to litigate in “all civil suits or other proceedings” on behalf of Missourians’ interests, and to “appear and interplead, answer or defend, in *any proceeding or tribunal* in which the state’s interest are involved,” *id.* (emphasis added), plainly includes the authority to file amicus briefs in cases that threaten the fundamental constitutional rights of all Missourians.

Third, the Attorney General’s authority to file an amicus brief in this case also rests on his broad constitutional and common-law powers. *See State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 136 (Mo. banc 2000). As the Supreme Court stated in *American Tobacco*, “[t]he attorney general of Missouri is the only constitutional officer whose powers and duties are not specifically provided for or limited by the constitution... The absence of a provision for specific powers for the attorney general in our constitution *vests the office with all of the powers of the attorney general at common law.*” *Id.* (emphasis added). Thus, “the office of attorney general is clothed, in addition to the duties expressly defined by statute, with all the powers pertaining thereto under the common law.” *Id.* (quoting *State ex rel. Barrett v. Boeckeler Lumber Co.*, 257 S.W. 453, 456 (Mo. 1924)). Unless the Attorney General’s authority to litigate on behalf of Missourians is specifically limited by statute, he retains broad authority to direct litigation and take legal positions on behalf of the State and its citizens, as he sees fit. *Id.* (holding that, “in the absence of a statute to the contrary,” the Attorney General has unfettered authority to direct litigation in the

interests of Missouri and its citizens). In fact, Rule 85.04(f)(4) and Section 27.060 reflect, and implement, this broad constitutional and common-law authority of the Attorney General.

Fourth, the Attorney General's authority to file amicus briefs in criminal cases where the State is represented by a local prosecutor is well-established in practice. This includes cases where the Attorney General's position as *amicus curiae* conflicts with the position of the local prosecutor. For example, in *State v. Richey*, the Missouri Supreme Court permitted the Attorney General to file an amicus brief as of right, in his own behalf, in a case where the State was represented by a county prosecutor's office. *See State v. Richey*, 569 S.W.3d 420 (Mo. banc 2019). In *Richey*, the county prosecutor contended on appeal that a criminal defendant's "board bill" was chargeable as court costs. *Id.* at 421-22. The Attorney General filed an amicus brief in the case disagreeing with the prosecutor's position and contending instead that "there is no statutory authority permitting jail board bills to be taxed as court costs." *Id.* at 423; *see also* Brief of Amicus Curiae the Missouri Attorney General *in State v. Richey*, No. SC97604 (filed Jan. 7, 2019). The Supreme Court accepted the Attorney General's amicus brief and relied on the Attorney General's argument in its opinion. *See Richey*, 569 S.W.3d at 423-25.

D. The Attorney General's Amicus Brief Properly Contends That the Public Interest Calls For the Speedy Dismissal of This Case.

The Circuit Attorney also argues that "[a]s a friend of the court, the AG is forbidden from taking sides in any manner, yet he advocates for Defendant." Mot. to Strike, at 7. This argument is incorrect, both as a matter of fact and as a matter of law.

First, it is factually incorrect to state that the Attorney General "advocates for Defendant" in this case. *Id.* As the Attorney General's amicus brief clearly states, he is *not* advocating for the defendant, but in defense of the fundamental rights of *all* Missourians to keep and bear arms in self-defense. *See* Amicus Brief of Attorney General (filed July 20, 2020), at 1-12. On its first

page, the amicus brief explains that the Attorney General “does *not* represent the Defendants in this case,” and that the pendency of the case “sends a powerful message to all Missourians that they exercise their fundamental right to self-defense at their peril.” *Id.* at 1 (emphasis added). The amicus brief explicitly stated that the Attorney General “has a duty to protect the fundamental rights of all Missourians, including the right to keep and bear arms in self-defense of one’s person and home.” *Id.*; *see also* MO. CONST. art. I, § 23 (directing that “the State of Missouri shall be obligated to uphold these rights” to keep and bear arms). The amicus brief noted that this “highly publicized criminal prosecution of Missouri citizens for exercising these fundamental freedoms threatens to intimidate and deter law-abiding Missouri citizens from exercising their constitutional right of self-defense.” *Id.* Thus, the amicus brief made clear that the Attorney General does not appear or advocate for the defendant’s interests. He appears as an amicus curiae to advocate for the *public* interest—to oppose the chilling effect of this case on the rights of parties not before the Court—which neither the Circuit Attorney nor the defendant represents. *See id.* The mere fact that the public interest coincides in part with the defendant’s interest does not change the Attorney General’s role as amicus curiae. As the Attorney General argued, “*public policy* dictates that this prosecution should not proceed”—not the defendant’s personal interests. *Id.* (emphasis added).

In addition, the Circuit Attorney’s argument is wrong as a matter of law. It is commonplace that arguments of *amici curiae* may support the position of one party, the other party, or neither party. There is no requirement of strict neutrality. On the contrary, modern authorities have overwhelmingly rejected the “small body of judicial opinions” that suggest that “an amicus must be ‘an impartial individual’ and not a person who is ‘partial to the outcome’ or who has ‘a pecuniary interest in the outcome.’” *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 130 (3d Cir. 2002) (Alito, J.). “This description of the role of an amicus ... became outdated long ago.”

Id. at 131. “The implication of this statement seems to be that a strong advocate cannot truly be the court’s friend. But this suggestion is contrary to the fundamental assumption of our adversary system that strong (but fair) advocacy on behalf of opposing views promotes sound decision making.” *Id.* For these reasons, in *Neonatology Associates*, then-Judge Alito held that third parties whose rights might be directly affected by the outcome of the case were proper *amici curiae*. *Id.* So also here—the Attorney General appears as *amicus curiae* and advocates for the interests of third parties whose rights are threatened by this case—*i.e.*, all Missourians who seek to exercise their fundamental right to keep and bear arms in self-defense. “[T]he core role of an amicus is to make policy arguments that explain how adopting a new rule or rendering a particular decision will benefit or harm those who are not before the court, including other litigants and society as a whole.” Stephen G. Masciocchi, *What Amici Curiae Can and Cannot Do with Amicus Briefs*, COLO. LAW., April 2017, at 23, 24. That is exactly what the Attorney General’s brief does here.

CONCLUSION

For the reasons stated, this Court should deny the Circuit Attorney’s “Motion To Strike Attorney General Eric Schmitt As A Party To The Case.”

Dated: September 9, 2020

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

/s/ D. John Sauer

D. John Sauer, #58721

Solicitor General

Cristian M. Stevens, #48028

First Assistant Attorney General

Justin D. Smith, #63253

Deputy Attorney General, Special Litigation

Missouri Attorney General's Office

Post Office Box 899

Jefferson City, MO 65102

Tel: (573) 751-8870

Fax: (573) 751-0774

E-mail: John.Sauer@ago.mo.gov

Counsel for Amicus Curiae Attorney General

CERTIFICATE OF SERVICE

I hereby certify that, on September 9, 2020, the foregoing was filed electronically through the Court's electronic filing system to be served electronically on all counsel of record.

/s/ D. John Sauer